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No. 94-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD B. ANDREWS,
Petitioner,

v.

ALASKA OPERATING ENGINEERS-EMPLOYERS TRAINING TRUST FUND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW:

Did the Alaska Supreme Court err in determining that petitioner's state law claims for wrongful discharge were preempted by ERISA, where the claims in question arose from dispute between co-fiduciaries of an ERISA plan over a matter of plan administration, relationships between such co-fiduciaries are extensively regulated by ERISA, the claims were premised on the existence of an ERISA plan, resolution of the merits of the claims would require interpretation and application of substantive provisions of ERISA and the governing trust agreement, and the claims are expressly covered, and a remedy provided, by Section 510 of ERISA?

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STATUTES INVOLVED

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A):

> ...a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets...or (iii) he has any discretionary authority or discretionary responsibility or discretionary responsibility in the administration of such plan.

ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A):

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan...

Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D):

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV of ERISA].

ERISA Section 406(a)(1), 29 U.S.C. § 1106(a)(1):

> Except as provided in section 408: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--(A) sale or exchange, or leasing, of any property between the plan

> and a party in interest; (B) lending of money or other extension of credit between the plan and a party in interest; (C) furnishing of goods, services, or facilities between the plan and a party in interest; [or] (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan...

ERISA Section 408(c), 29 U.S.C. § 1108(c):

> Nothing in section 406 shall be construed to prevent a fiduciary from--...(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan...

Section 502(a) of ERISA, 29 U.S.C. § 1132(a):

> A civil action may be brought...by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1):

> Except for actions under subsection (a)(1)(B) of this section, [relating to actions for plan benefits] the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary [of Labor] or by a participant, beneficiary or fiduciary...

Section 510 of ERISA, 29 U.S.C. § 1140:

> ...It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is

about to testify in any inquiry or proceeding relating to this Act...The provisions of section 502 shall be applicable in the enforcement of this section.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a):

...the provisions of [Titles I and IV of ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...

I. STATEMENT OF THE CASE

Respondent Trust is a collectively bargained, joint labor-management trust fund created and administered under Section 302(c)(5) of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), 29 U.S.C. § 186(c)(5). It is also an "employee welfare benefit plan" as defined in Section 3(1) of the Employee Retirement Income Security Act of 1974 as amended (ERISA), 29 U.S.C. §1002(1), and subject to coverage under ERISA by virtue of ERISA Section 4(a), 29 U.S.C. § 1003(a). The Trust provides job-related training to apprentices and journeymen represented by the participating local union.[1]

The Trust is governed by an Agreement and Declaration of Trust (the Trust Agreement), which authorizes the trustees to employ administrative agents and other necessary personnel, and to delegate to such persons "any of their rights, powers, duties and responsibilities with respect to the Trust fund and the administration of the [training] plan." The Trust

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[1] Appendix A to Petition, p. 3.

Agreement further provides, however, that: "Any such... delegation...shall be terminable upon such notice as the Trustees in their sole discretion deem reasonable and prudent under the circumstances."[2]

Petitioner Ronald Andrews was employed as the administrative manager of the Trust and, in that capacity, exercised sufficient discretionary authority to qualify as a fiduciary with respect to the Trust, as defined in Section 3(21)(a) of ERISA, 29 U.S.C. § 1002(21)(a).[3] He was authorized to sign checks on behalf of the Trust, but that authority was limited by an express provision of the Trust Agreement. One of the Trust's defenses on the merits of Andrews' wrongful discharge claims is that Andrews breached his fiduciary duty by signing checks for much higher amounts than permitted by the Trust Agreement, and that those breaches constituted absolute grounds for termination under ERISA Section 409(a), 29 U.S.C. § 1009(a).[4] Another defense on the merits is that the

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[2] Appendix A hereto, at p. 2.
[3] Appendix A to Petition, pp. 3, 4 and 23.
[4] Appendix A hereto, pp. 3, 4, and 10.

above-quoted provision of the Trust Agreement permitting the trustees to terminate any delegation of authority "in their sole discretion" overrides any implied covenant or contract under state law, as between ERISA co-fiduciaries.

Andrews was terminated from his position as administrative manager in October, 1989. He alleged in Count I of his complaint that he was terminated "in order to prevent him from giving information and testifying about the possible misuse of Trust funds," and in Count II that he was fired "for reporting possible misuse of Trust funds."[5] The "possible misuse of Trust funds" referred to in the complaint involved the reimbursement of a trustee's expenses for attending a Trust meeting. Andrews suspected that the reimbursement had been improper and reported his suspicion to an ERISA investigator for the U.S. Department of Labor, as well as the Trust's attorney, shortly before the formal vote to terminate his

[5] Appendix A to Petition, p. 5.

services.[6]

The circumstances under which an ERISA trustee may be properly reimbursed for expenses are set forth in ERISA Sections 404, 406 and 408, 29 U.S.C. §§ 1104, 1106 and 1108, and the regulations thereunder. Thus, any determination as to whether the reimbursement paid in this case constituted a "misuse of Trust funds," or could reasonably have been considered or suspected as such, would require interpretation and application of those provisions.

The Alaska Supreme Court found Andrews' state law claims preempted by ERISA after carefully considering the distinctions between this case and other cases in which an ERISA trust may operate "like any other commercial entity."[7] The claims asserted in Andrews' pending federal suit are virtually identical to those asserted here.

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[6] Appendix A hereto, pp. 7 and 8. There is a factual dispute as to whether any of the trustees were aware of the questions raised by Andrews or his contact with the DOL investigator at the time the vote was taken. The courts below based their decisions on the allegations of the complaint and Andrews' deposition testimony, without attempting to determine their veracity, and the same approach is appropriate here.

[7] Appendix A to Petition, pp. 24 and 25.

II. ARGUMENT

A. There are no "Special and Important Reasons" to grant Certiorari in this Case, as Required by Rule 10.1.

This case turns on a unique set of facts and relationships, including the following:

1. Andrews' status as a fiduciary with respect to the Trust, and the fact that relationships between and among co-fiduciaries and between fiduciaries and the plans themselves are extensively regulated by ERISA.

2. The fact that both of Andrews' state law claims are predicated on the existence of an ERISA trust and the reporting of or threat to report a possible "misuse of Trust funds."

3. The need to interpret and apply substantive provisions of ERISA in order to determine whether a "misuse of Trust funds" occurred or could reasonably have been thought to have occurred.

4. The need to interpret and apply provisions of the governing Trust Agreement and ERISA Section 404(a)

(1)(D), 29 U.S.C. § 1004(a)(1)(D), requiring adherence to such documents by plan fiduciaries, in order to adjudicate the Trust's defenses on the merits.

5. The Alaska Supreme Court's finding that the "public policy" element of Andrews' state law claims is codified in ERISA.[8]

6. The fact that Andrews' claims are expressly covered and governed by Section 510 of ERISA, 29 U.S.C. § 1140, which provides a remedy for such claims.

There have been no reported cases since the enactment of ERISA, nearly twenty years ago, involving this unique combination of facts and relationships. The decisions of the courts below will not affect the ordinary employment relationships between ERISA plans and their non-fiduciary employees, nor will they provide any special protection for such plans if the plans are truly operating "like any other commercial entity" in areas outside the ambit of ERISA regulation. The likelihood that the decisions below will have

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[8] *Id.*, p. 22.

an "important" or even significant impact on other relationships between ERISA plans and their employees--even those who are fiduciaries--is extremely remote.

This Court has already addressed the pivotal issue in this case; i.e., that Andrews' claims are covered, and a remedy provided, by Sections 510 and 502(a) of ERISA. Section 510, 29 U.S.C. § 1140, states:

> ...It shall be unlawful for any person to discharge...any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]...The provisions of section 502 shall be applicable in the enforcement of this section.

ERISA Section 502(a), 29 U.S.C. § 1132(a) provides in turn that:

> A civil action may be brought...by a...fiduciary (A) to enjoin any act or practice which violates any provision of [Title I of ERISA, which includes Section 510]...or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of [Title I]...

This Court held in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) that:

> ...Congress intended [ERISA] § 502(a) to be the exclusive remedy for rights guaranteed by ERISA, including those provided by § 510...
>
> * * *
>
> ...we hold that "'when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected" by § 510 of ERISA, "due regard for the federal enactment requires that state jurisdiction must yield.'" [Citation omitted.]

498 U.S. at 144 and 145.

Since this case turns on a unique combination of facts and relationships unlikely to be present in any other case, and since the pivotal issue has already been decided by this Court, there are no special or important reasons to grant certiorari here.

B. <u>There are no Conflicts between the Alaska Supreme Court's Decision Here and Decisions of Other State Courts of Last Resort or United States Appellate Courts</u>.

Andrews argues that the opinion of the Alaska Supreme Court is in conflict with the following decisions by other courts: *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989); *Ethridge v. Harbor House Restaurant*, 861 F.2d

1389 (9th Cir. 1988); *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987); *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984); *Pace v. Signal Technology Corp.*, 417 Mass. 154, 628 N.E.2d 20 (Mass. 1994); and *Cutler v. Phillips Petroleum Co.*, 71 Wash.App. 511, 859 P.2d 1251 (Wash.App. 1993).[9] All of those cases, however, are distinguishable from the instant case on one or more of the grounds identified in Part II.A, above.

None of the cases cited except *Sorosky, supra,* involved claims cognizable under ERISA Section 510, and the Section 510 claim in *Sorosky* was held preempted. None of the cited cases required interpretation or application of the fiduciary responsibility provisions of ERISA or of the governing plan document, nor did any involve relationships among ERISA co-fiduciaries or public policies codified in ERISA. Further, the Ninth Circuit's decision in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), cited extensively and followed in the opinion below, eliminated any possible suggestion of a conflict

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[9] The Washington Court of Appeals is not a court of last resort.

between earlier decisions of that court and the Alaska Supreme Court's decision here.

C. **The Decision Below was Correct.**

The decision of the Alaska Supreme Court was fully consistent with *Ingersoll-Rand Co. v. McClendon, supra,* and other decisions of this Court, and with the lower court decisions in analogous cases. *Ingersoll-Rand* held quite clearly that ERISA preempts state law claims within the ambit of ERISA Section 510, and that holding is dispositive here. Moreover, *Hashimoto v. Bank of Hawaii, supra, Anderson v. Electronic Data Systems,* 11 F.3d 1311 (5th Cir. 1994), *cert. petition filed* April 25, 1994, *McClean v. Carlson Cos.*, 777 F.Supp. 1480 (D. Minn. 1991) and *Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds,* 559 F.Supp. 158 (N.D. Ill. 1982), the only "whistleblower" cases cited by either party, all held the state law claims in question preempted by ERISA, based on the same established principles and analysis applied by the Alaska Supreme Court in this case.

The decision below is supported by the clear weight of authority in ERISA preemption cases and by unanimous authority in cases dealing specifically with ERISA preemption of state law "whistleblower" claims cognizable under ERISA Section 510. Even if certiorari were routinely granted for the sole purpose of correcting errors by the lower courts, there would be no reason to grant it here.

III. CONCLUSION

Petitioner has failed to demonstrate that the decision below conflicts with any decision of this Court, another state court of last resort or a United States court of appeals. He has also failed to demonstrate that the decision below was in error, or that there are any special or important reasons to grant certiorari in this case. The petition should therefore be denied.

Respectfully submitted this first day August, 1994.

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APPENDIX A
TO
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXCERPTS FROM RESPONDENT'S BRIEF TO THE SUPREME COURT OF THE STATE OF ALASKA

by Local No. 302 of the International Union of Operating Engineers. The purpose of the Trust is to provide job-related training to apprentices and journeymen represented by Local No. 32. R.11, ¶2.

This Trust is governed by an Agreement and Declaration of Trust (the Trust Agreement), which authorizes the Trustees to employ administrative agents and other necessary personnel, and to delegate to such persons "any of their rights, powers, duties and responsibilities with respect to the Trust fund and the administration of the [training] plan." R.11, ¶3; R.24, Art. IV, § 10; R.31, Art. VI, § 4(a). The Trust Agreement further provides, however, that: "Any such...delegation... shall be terminable upon such notice as the Trustees in their sole discretion deem reasonable and prudent under the circumstances." *Id.*

B. Andrews' Employment and Fiduciary Status

Plaintiff/appellant Andrews was originally employed by the Trust as a "Field Coordinator" and promoted to "Administrative Manager" in May, 1986. R.51, l.3 - R.56, l.11.

As Administrative Manager, he was responsible for dispatching the apprentices to the jobsites and monitoring their performance, and had the authority to remove them from the job for disciplinary reasons. R.51, ll.3-17; R.59, l.22 - R.60, l.10; R.72, ll.20-24. He also participated in the recruitment and selection of the apprentices, including the scoring of the applications and interviews which determined which candidates would be admitted to the program. R.66, l.8 - R.71, l.1.

When Andrews assumed the position of Administrative Manager he became the supervisor of the remaining Field Coordinator and the Trust's only clerical employee. R.57, l.14 - R.58, l.13. In 1989, the clerical employee gave herself an unauthorized raise and the Chairman of the Board of Trustees suggested that she be fired, but Andrews made a decision not to fire her. R.73, ll.15-21; R.75, l.25 - R.81, l.21.

Andrews also had and exercised the authority to direct the transfer of funds from the Trust's investment manager to the checking account, which he controlled. There was no limit

on the amount of funds he was allowed to transfer. R.64, l.11 - R.66, l.7. Checks were normally required to have two signatures, but could be issued by Andrews himself through the use of a signature stamp. R.61, l.10 - R.62, l.14. Andrews was authorized to, and did, sign checks up to $5,000 pursuant to the following provisions of the Trust Agreement:

> All checks, drafts, vouchers or other withdrawals of money from the Fund shall be authorized in writing or countersigned by at least one Employer Trustee and one Employee Trustee, with the exception that payroll checks, employment taxes and other normal expenditures may be authorized by the signature of one Trustee and the signature of the Administrative Manager or the Administrative Manager's designee. This exception shall not apply to the purchase of equipment or training expenditures to exceed the sum of five thousand dollars ($5,000.00) for any one expenditure.

R.62, l.19 - R.64, l.5; R.11, ¶3; R.27, Art. IV, § 16.

Notwithstanding the express limitation in the Trust Agreement, Andrews also signed at least two checks for large equipment purchases--one in the amount of $60,000. R.74, ll.4-20.

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), provides in part that:

> ...a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets...or (iii) he has any discretionary authority to discretionary responsibility in the administration of such plan...

Consequently, both Andrews and the Trustees were "fiduciaries" as defined by ERISA and subject to the requirements of that statute.

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) also provides in part that:

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV of ERISA].

One of the issues to be resolved if this case should reach the merits is whether Andrews' failure to comply with the "co-signature" requirement of the Trust Agreement--which was

one of the reasons for his termination--violated ERISA § 404(a)(1)(D).

C. Andrews' Claim

Andrews makes two basic claims in this lawsuit. Both are predicated on alleged violations of ERISA by Trustee George Williams.

Count I of the Complaint alleges that Andrews "found documents" indicating that Williams may have charged the Trust twice for the same Trust expenses or for non-trust related expenses, and the "misuse of Trust funds" is a violation of ERISA. Count I alleges further that Andrews' employment as Administrative Manager was terminated "in order to prevent him from giving information and testifying about the possible misuse of Trust funds," and that said termination violates the express public policy of the State of Alaska and the United States. R.2&3, ¶¶5, 6, 8 and 9.

Count II of the Complaint realleges the claims regarding Williams' purported misuse of Trust funds, and asserts that "the Trust breached the covenant of good faith and fair dealing

by firing plaintiff for reporting possible misuse of Trust funds." R.3, ¶¶11 and 14.

Andrews reiterates in this Court that:[1]

> The central issue in plaintiff's complaint is that Mr. Williams had a duty not to misuse trust funds.

Andrews testified by deposition that the alleged "misuse of Trust funds" by Williams consisted of his receipt of reimbursement for an airline ticket purchased for his attendance at the Trust meeting in Washington state in May, 1986. R.82, l.2-86, l.21; R.87, l.4-96, l.6; R.106, l.24-108, l.12. (The Trust acknowledged in the trial court that Williams did exchange that particular ticket for cash, but also advised the trial court that Williams did attend the meeting in question and never charged the Trust for his travel from Alaska to Seattle and return. Thus, on the merits, the Trust denies that Williams ever received double reimbursement for the trip, or that he ever charged the Trust for "non-trust related expenses." R.115 and 116.)

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[1] Appellant's Opening Brief, p.12, N.9.

Andrews further testified that he was given various documents relating to the travel expenses in question by the Trust's clerical employee and discussed the contents of those documents with Williams himself, the Trust attorney and an ERISA investigator for the U.S. Department of Labor shortly before his employment was terminated. R.82, l.2-86, l.21; R.87, l.4-91, l.18; R.96, l.7-102, l.19.

Transactions between an ERISA trust fund and its trustees and other fiduciaries and "parties in interest" are expressly governed by ERISA Sections 404, 406 and 408, 29 U.S.C. §§ 1104, 1106 and 1108.[2]

ERISA Section 404(a)(1) provides that:

> ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan...

ERISA Section 406(a) provides that:

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[2] Trustees and othe fiduciaries are "parties in interest" as defined in ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

from that position by the Trustees of the plan, who were also fiduciaries. See Part II.B., *supra*, and record references cited therein.

Alaska state law does recognize a claim for relief for "retaliatory discharge" as part of an "implied covenant of good faith" except to the common law "at will" employment doctrine. *See, e.g., Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990). In order to prevail on such a claim, however, the plaintiff must prove, *inter alia*, that the discharge violates "public policy" in that the retaliatory motive strikes "at the heart of a citizen's social rights, duties, and responsibilities." *Leudtke v. Nabors Ala. Drilling, Inc. (Leudtke I)*, 763 P.2d 1123, 1132 (Alaska 1989) (citing *Palmateer v. International Harvester*, 85 Ill.2d 124 (1981)). The "public policy" and "rights, duties and responsibilities" involved in this case are all expressly codified in ERISA.

Andrews would also have to prove, in order to prevail on either of his state law claims, that his termination was based on a motive that was both retaliatory and improper, or that the

Trustees' exercise of their discretion was in some way unreasonable or unfair. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 199 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 2014 (1991); *Leudtke I, supra; Leudtke v. Nabors Alaska Drilling, Inc. (Leudtke II)*, 834 P.2d 1220 (Alaska 1992). A finding that Andrews had breached his fiduciary duties under ERISA would provide an absolute defense under either formulation. ERISA § 409(a), 29 U.S.C. § 1109(a); *Marshall v. Kelly*, 465 F.Supp. 341 (W.D. Okla. 1978); *Marshall v. Snyder*, ___F.Supp.___, 1 Employee Benefit Cases (EBC) 1878 (E.D. N.Y. 1979). Further, even if it were shown that Andrews' complaints about Williams' expenses had been a factor in his termination (which the Trust denies), the reasonableness or unreasonableness of those complaints would have to be considered in evaluating the reasonableness of the Trustees' response. *Hashimoto, supra.* And as shown, the reasonableness of Andrews' complaints against Williams depends entirely on the provisions of and interrelationships among ERISA §§ 404, 406 and 408. See Part II.C, *supra*, and record references cited therein.